

STATEMENT OF JAMES BAMFORD
BEFORE THE DEMOCRATIC MEMBERSHIP
OF THE HOUSE JUDICIARY COMMITTEE

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Mr. Chairman and members of the Committee, I deeply appreciate the opportunity to speak before you today on an issue of great importance – whether the president of the United States has the legal authority to eavesdrop on American citizens in the United States without a warrant.

By way of background, I am the author of *The Puzzle Palace: A Report on NSA, America's Most Secret Agency* (Houghton Mifflin, 1982) and its sequel, *Body of Secrets: Anatomy of the Ultrasecret National Security Agency* (Doubleday, 2001). My most recent book is *A Pretext For War: 9/11, Iraq and the Abuse of America's Intelligence Agencies* (Doubleday, 2004). I have also written a great many articles on the NSA and other intelligence organizations for *The New York Times*, *The Washington Post* and a number of other publications. I have probably written more on the National Security Agency than any other person. I also have a law degree, although I have confined my career to writing and journalism rather than the practice of law.

In the short time that I have, I would like to discuss some of the events that lead to the enactment of the Foreign Intelligence Surveillance Act, how the act applies to the NSA, and the dangers in violating the law. These dangers were long foreseen by Senator

Frank Church, the Idaho Democrat who led the investigation into the abuses of the intelligence agencies in 1975. Following his probe of the NSA, Senator Church came away shocked and warned of the dangers of what might be called techno-tyranny. The agency's technological capability, he said, "at any time could be turned around on the American people and no American would have any privacy left, such [is] the capability to monitor everything: telephone conversations, telegrams, it doesn't matter. There would be no place to hide.

"If this government ever became a tyranny, if a dictator ever took charge in this country, the technological capacity that the intelligence community has given the government could enable it to impose total tyranny, and there would be no way to fight back, because the most careful effort to combine together in resistance to the government, no matter how privately it was done, is within the reach of the government to know. Such is the capability of this technology."

Senator Church spoke those words more than three decades ago, when the NSA's domestic surveillance capability was limited to hardline telephones and an occasional telegram. The agency had no access to the mail. Today the NSA is the largest intelligence agency on earth, and by far the most dangerous if not subjected to strict laws and oversight. It has the ability to virtually get into someone's mind. It can read a person's most private thoughts expressed in e-mail correspondence sent from their home computer, eavesdrop on their cell phone as they drive to work, read the messages from

their Blackberry as they ride the elevator, and then listen in on their office telephone, and monitor their computer and fax machine as they conduct business.

A quick look at NSA's history outlines the dangers.

Created in 1952 by a top secret memorandum signed by President Harry S Truman, the agency made a secret agreement with the head of Western Union and the chiefs of country's other major telecommunications companies. Codenamed Operation Shamrock, the project involved company employees every night passing to NSA employees computerized tapes of virtually all the private telegrams passing through their systems. The NSA agents would then take them to an office in Manhattan masquerading as a television tape processing company where they would make duplicates. In the early morning, the original tapes were returned to the companies and the duplicates were transported to NSA headquarters at Ft. Meade where they would be run through very fast, very powerful computers loaded with names, including those of many Americans. Those telegrams would then be kicked out, analyzed and the contents shared with other agencies both in the U.S. and in a number of foreign countries. Never once was a warrant ever sought. The operation continued for more than two decades and involved tens of millions of private messages.

Then during the Watergate period, President Nixon turned NSA's giant ear even further inward. Concerned about the growing protest movement against the on-going war in Vietnam, he called into his office the director of the National Security Agency, Vice

Admiral Noel Gayler, and ordered him to begin eavesdropping on Americans. Back at NSA, the agency's deputy director called the change of policy, "nothing less than a heaven-sent opportunity for NSA." Within days, the NSA's Operation Minaret was targeting the international communications of singer Joan Baez, baby doctor Benjamin Spock, civil rights organizer Dr. Martin Luther King, Jr, and thousands of others who were simply engaging in free speech, all without a warrant. Without oversight or restraint, the agency began turning its giant electronic vacuum cleaner towards other targets, even placing on their growing watchlist the names of two authors who were simply planning to mention NSA in books they were writing.

Following the discovery of NSA's massive, warrantless domestic spying by the Church Committee and another committee set up under Republican Vice President Nelson Rockefeller, the Justice Department in the Ford administration launched an enormously secret criminal investigation of the agency. The investigation was so secret that the Justice Department during the Reagan administration threatened me with prosecution if I revealed it. According to documents I had obtained, senior officials were read their Miranda rights and threatened with criminal prosecution if they failed to cooperate. In the end, after more than a year of investigation, the Justice Department turned up 23 categories of questionable activities. But because of the extreme secrecy of the agency's activities and the lack of established law, they declined to prosecute. Instead they recommended that Congress explore the creation of new legislation outlawing this type of presidentially authorized abuse.

A year later, Congress enacted the Foreign Intelligence Surveillance Act which established the Foreign Intelligence Surveillance Court. Paramount in that legislation was preventing future presidents from doing what President Nixon did – secretly ordering the NSA to turn its giant parabolic antennas inward on innocent Americans. Testifying before the House Intelligence Committee in 1978, Attorney General Griffin B. Bell said, “I would particularly call your attention to the improvements in this bill over a similar measure introduced in the last Congress. First, the current bill recognizes no inherent power of the President to conduct electronic surveillance. Whereas the bill introduced last year contained an explicit reservation of Presidential power for electronic surveillance within the United States, this bill specifically states that the procedures in the bill are the exclusive means by which electronic surveillance, as defined in the bill, and the interception of domestic wire and oral communications may be conducted.”

Yet that is precisely what President Bush is doing. As a result, instead of an impartial federal judge steeped in the law, the person picking which Americans should be eavesdropped on is a shift supervisor at NSA, someone who has likely never read a law book. There are no checks and balances.

The reason the administration has decided to ignore the FISA law can not be speed, because FISA allows for the surveillance to begin immediately in an emergency. All that is required is that a retroactive warrant request be made within three days. Nor is it likely some new technology, because that is something that Congress could take care of by tweaking the existing statute. Instead, the likely reason for going around FISA is that

the Americans being targeted do not meet the required “probable cause” standard. “The information was so thin,” a former senior prosecutor told reporters from The New York Times, “and the connections were so remote, that they never led to anything, and I never heard any follow-up.” Thus, the Bush administration is engaging in just the sort of warrantless fishing expedition that FISA was designed to prevent.

Today, NSA’s giant listening posts in Sugar Grove, West Virginia and Yakama, Washington target virtually all international satellite communications – telephone, cell phone, fax and e-mail – going in or out of the United States. A normal NSA spy base intercepts approximately two million communications an hour. With no longer any FISA buffer between the NSA eavesdroppers and the American public, anyone’s communications can be targeted. Once a name is placed secretly on NSA’s watchlist, it will likely be sent not only to other agencies within the United States, but also to NSA’s partner agencies in the U.K., Canada, Australia and New Zealand.

And like India ink, there is no removal. Five years later, when an innocent target attempts to get a new mortgage or take a trip to England, they may be turned down or turned away, with no explanation given. Who is a target would also likely change as administrations change. Today it might be a Muslim who demonstrates against the Bush administration’s war in Iraq. But next time it could be a Christian fundamentalist belonging to an international anti-abortion group.

Such thoughts were not far from Frank Church's mind when he warned, "I don't want to see this country ever go across the bridge. I know the capacity that is there to make tyranny total in America, and we must see to it that this agency and all agencies that possess this technology operate within the law and under proper supervision, so that we never cross over that abyss. That is the abyss from which there is no return."